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NO. 24806

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

FIRST INSURANCE COMPANY OF HAWAII, LTD.,  
Complainant-Appellee, v. EMERSON M. F. JOU, M.D., and  
EMERSON M. F. JOU, dba COMPREHENSIVE CLINIC OF  
REHABILITATION MEDICINE, Respondents-Appellants, and  
SPECIAL COMPENSATION FUND, Appellee

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS APPEALS BOARD  
(Case No. MISC 90-001)  
(C-9001) (2-87-11296)

SUMMARY DISPOSITION ORDER

(By: Lim, Acting C.J., Foley and Nakamura, JJ.)

Respondent-Appellant Emerson M.F. Jou, M.D., dba Comprehensive Clinic of Rehabilitation Medicine (Dr. Jou or Appellant), appeals the December 17, 2001 decision and order of the Labor and Industrial Relations Appeals Board (the Appellate Board). The Appellate Board's decision and order affirmed the November 21, 1990 decision and the October 30, 1991 supplemental decision of the Director of Labor and Industrial Relations (the Director), both in favor of Complainant-Appellee First Insurance Company of Hawaii, Ltd. (FICOH), and both of which Dr. Jou had appealed to the Appellate Board.

Upon a painstaking review of the record and the briefs submitted by the parties, and giving sedulous consideration to the arguments advanced and the issues raised by the parties, we

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resolve Dr. Jou's points of error on appeal as follows:

1. Dr. Jou first avers that the advisory panel, convened by the Director for assistance pursuant to Hawaii Revised Statutes (HRS) § 386-27(d) (1993)<sup>1</sup> and Hawaii

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<sup>1</sup> Hawaii Revised Statutes (HRS) § 386-27 (1993) provides:

(a) All health care providers rendering health care and services under this chapter shall be qualified by the director and shall remain qualified by satisfying the requirements established in this section. The director shall qualify any person initially who has a license for the practice of:

- (1) Medicine under chapter 453;
- (2) Dentistry under chapter 448;
- (3) Chiropractic under chapter 442;
- (4) Osteopathy under chapter 460;
- (5) Naturopathy under chapter 455;
- (6) Optometry under chapter 459;
- (7) Podiatry under chapter 463E; or
- (8) Psychology under chapter 465.

(b) To remain a qualified provider under this chapter a health care provider shall:

- (1) Comply with guidelines established by the director on the frequency of treatment and reasonable utilization of health care and services;
- (2) Conform to limitations established by the director for charges on services under medical fee and other fee schedules;
- (3) File timely reports required under section 386-96;
- (4) Avoid unnecessary and unreasonable referrals of injured employees to other health care providers;
- (5) Refrain from ordering unnecessary and unreasonable diagnostic tests and studies;
- (6) Remain available as a treating health care provider to injured employees and as an advisor to the director in proceedings under this section; and

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<sup>1</sup>(...continued)

(7) Comply with all requirements established under this chapter and by rules and decisions adopted and issued by the director pursuant to this chapter.

(c) Any health care provider who fails to comply with subsections (a) and (b) may be subject to such sanctions deemed just and proper by the director which may include:

- (1) Disallowance of fees for services rendered to an injured employee;
- (2) Forfeiture of payments for services rendered to an injured employee under this chapter;
- (3) Fines of not more than \$1,000 for each violation;
- (4) Suspension as a qualified provider; and
- (5) Disqualification as a provider of services under this chapter.

(d) No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date of the complaint. A copy of the complaint shall be sent to the health care provider charged promptly upon receipt by the director. The director may establish an advisory panel of health care providers consisting of three members, one selected by the complainant, another selected by the health care provider charged, and the third selected by the director who shall assist the director in any case arising under this section. Fees for services rendered by members of the advisory panel shall be paid for by the special compensation fund. No member of the advisory panel shall be liable in damages for libel, slander, or other defamation of character of any party for any action taken while acting within their capacities as members of the advisory panel.

The director shall issue, where a sanction is ordered under this section, a written decision of findings following a hearing held upon not less [than] twenty days written notice to the complainant and the health care provider charged. No violation shall be found unless the director determines that the violator acted in bad faith. Any person aggrieved by a decision of the director may appeal the decision under section 386-87.

(e) In any case arising under this section, the injured employee treated by the health care provider charged with a violation of this section shall not be a party to the proceeding and shall not appear unless called as a witness before the director or the appellate board. Charges for services rendered by the health care provider alleged to be in violation of this section shall be suspended pending action by the director and the  
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Administrative Rules (HAR) §§ 12-13-20, -21 & -22 (January 1, 1990 - December 31, 1992), violated his constitutional rights. Specifically, Dr. Jou contends, "At least one decisionmaker relied on by the agency (Dr. Calvin [C.M.] Kam [(Dr. Kam)]), was personally and financially interested in his decision against Appellant, in violation of Article 1, Section 5 of the Constitution of the State of Hawaii, and the Fifth and Fourteenth Amendments to The United States Constitution." Opening Brief at 2 (citation to appendix omitted). This argument is unavailing. Dr. Jou's appeal to the Appellate Board was a *de novo* proceeding, HRS § 386-27(d) ("Any person aggrieved by a decision of the director may appeal the decision under section 386-87."); HRS § 386-87(b) (1993) ("The appellate board shall hold a full hearing *de novo* on the appeal."), and nothing in the record indicates the Appellate Board relied upon the recommendations the advisory panel made to the Director. Indeed, the record affirmatively shows that the Appellate Board could not have relied upon the panel's recommendations, because the propriety *vel non* of the Director's convening of the advisory panel -- specifically, FICOH's choice of Dr. Kam -- was an issue to be decided and in fact decided on appeal by the Appellate Board at

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<sup>1</sup>(...continued)  
appellate board in cases on appeal.

In any case in which fees for services rendered by a health care provider are disallowed by the director, the health care provider shall be ordered to forfeit payment.

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the behest of Dr. Jou. Furthermore, we are somewhat nonplused by Dr. Jou's animadversions upon alleged bias on the part of Dr. Kam, because an advisory panel member selected by a party pursuant to HRS § 386-27(d) can be expected to be attuned to that party. Cf. Daiichi Hawai'i Real Estate Corp. v. Lichter, 103 Hawai'i 325, 343, 82 P.3d 411, 429 (2003) ("Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be 'neutral,' at least in the sense that the third arbitrator or a judge is." (Citation and internal quotation marks omitted.)). Dr. Jou well realized this fact of life all along, as is evidenced by his objection to the selection of Dr. Kam, raised before the panel convened, as "the other side's hired gun[.]" We note in this respect that Dr. Jou selected his own "hired gun" to serve on the advisory panel. In any event, Dr. Jou does not point out, and nothing in the record indicates, that Dr. Kam -- though certainly strongly opinionated against Dr. Jou's diagnoses and treatments -- participated in the advisory panel unfairly, dishonestly or in bad faith. Cf. id. at 344, 82 P.3d at 430 ("The fact that party selected arbitrators are not expected to be 'neutral,' however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest, and good-faith manner." (Brackets, citation and internal quotation marks omitted.)). As for Dr. Jou's allegation that Dr.

Kam was paid more than the other panel members, the record confirms that Dr. Kam was paid by the special compensation fund the same amount (\$200) as the other panel members, pursuant to HRS § 386-27(d) and HAR § 12-13-22. Finally, we observe that all of the cases relied upon by Dr. Jou in this connection dealt with adjudicators. See, e.g., In re Water Use Permit Applications, 94 Hawai'i 97, 122, 9 P.3d 409, 434 (2000). In our case, the advisory panel was just that, advisory. This final point also disposes of Dr. Jou's cursory argument that the advisory panel scheme of HRS § 386-27(d) "impermissibly delegated governmental power to private individuals[.]" Opening Brief at 26 (citation to the appendix omitted).

2. Dr. Jou next asserts that the workers' compensation medical fee schedule (MFS), by restricting compensation for physical therapy to services provided by "duly registered physical therapist[s,]" HAR § 12-13-1 (January 1, 1987 - December 31, 1989) (definition of "therapist"), "is inconsistent with the licensing statutes for physicians in this State." Opening brief at 27 (citation omitted). Essentially, Dr. Jou, a physiatrist, invokes a sort of medical hierarchy in arguing that a physiatrist may bill under the MFS for any services, including physical therapy services, rendered within the physiatrist's field of expertise, regardless of whether the physiatrist is licensed to provide the particular services. For support, Dr. Jou cites the licensing statutes for physicians and certain Medicare billing

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policies, all of which are, however, inapposite and unavailing. Besides, Dr. Jou admitted, and the Appellate Board found, that he did not provide the physical therapy services he billed for and, indeed, was elsewhere in his clinic when the services were being provided by unlicensed staff. Dr. Jou also contends the relevant provisions of the MFS work a taking of his property without due process of law, "in violation of the Fifth Amendment U.S. Constitution and Article 1, Section 5 of the Hawaii Constitution[.]" Opening Brief at 27 (capitalization modified). Dr. Jou makes no detectable argument in support of this assertion, and thus fails in his burden on appeal to prove the administrative provisions unconstitutional beyond a reasonable doubt, and to show the constitutional defect clearly, manifestly and unmistakably. Sifagaloa v. Bd. of Tr. of the Employees' Ret. Sys. of the State of Hawai'i, 74 Haw. 181, 191, 840 P.2d 367, 371 (1992). This second point on appeal lacks merit.

3. Dr. Jou's final argument, in its entirety, is as follows: "Any alleged violation was to be calculated within the two year bar, pursuant to HRS § 386-27(d). As to those alleged violations there was no jurisdiction to include them in the calculations." Opening Brief at 32. We disagree. HRS § 386-27(d) provides in pertinent part that, "No sanction shall be imposed by the director under this section except upon submission of a written complaint which shall specifically allege that a violation of this section occurred within two years of the date

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of the complaint." In construing statutes, "our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself." Water Use, 94 Hawai'i at 144, 9 P.3d at 456 (citation and block quote format omitted). The written complaint in this case specifically alleged that more than a hundred violations of HRS § 386-27 occurred within two years of the date of the complaint.

Therefore,

IT IS HEREBY ORDERED that the December 17, 2001 decision and order of the Appellate Board is affirmed.

DATED: Honolulu, Hawai'i, May 7, 2004.

On the briefs:

Stephen M. Shaw, for  
respondent-appellant.

Acting Chief Judge

Dennis E. W. O'Connor,  
Kelvin H. Kaneshiro and  
Jeffrey K. Hester (Reinwald,  
O'Connor & Playdon), for  
complainant-appellee.

Associate Judge

Associate Judge